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Supreme Court, U.S.
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No. 10-721

IN THE

Supreme Court of the United States

SENSIENT TECHNOLOGIES CORP., and
SENSIENT FLAVORS, LLC
Petitioners,

v.

SENSORYEFFECTS FLAVOR COMPANY, FORMERLY
KNOWN AS SENSORYFLAVORS, INC.
PERFORMANCE CHEMICALS & INGREDIENTS, CO.,
DIEHL FOOD INGREDIENTS, INC., and
HIGHLANDER PARTNERS, L.P.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF

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February 11, 2011

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REPLY BRIEF

REASONS FOR GRANTING THE WRIT

Respondents' opposition fails to rebut the reasons that justify review of the question presented. Respondents never dispute that the circuits are split over whether evidence that a party intentionally selected a mark to confuse customers gives rise to a presumption that the selected mark will likely confuse customers. Instead, Respondents contend that this circuit conflict is irrelevant; Respondents'

opposition is nothing but an argument that the disputed evidence does not prove that the former Sensient executive, Nicolais, intended to confuse customers by first using the name "SensoryFlavors" and then, after a temporary restraining order was entered, "SensoryEffects Flavors," to compete against Sensient Flavors.

Likelihood of confusion is an issue of fact, however, and Respondents ignore that this case was not resolved at a trial but on summary judgment, when all reasonable inferences should have been drawn in Sensient's favor. Respondents' long recitation of supposed undisputed facts ignores the dissent on this point. As the dissent explained, the evidence of record allowed a fact finder to conclude that Sensient's ex-executive selected similar marks intending to confuse customers (App. A.29a-30a):

> Intent is proved by circumstantial evidence, and from these circumstances, a reasonable jury could find that the defendant, having been rebuffed in its efforts to use the name Sensory-Flavors to generate confusion with Sensient Flavors, still intended to confuse the public by shifting to the name of SensientEffects Flavor Company. To be sure, we have said that "[k]nowledge of another's product and an intent to compete with that product" is not the same as intent to cause consumer confusion, *Gen. Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 627 (8th Cir. 1987), but this is not a garden-variety "intent to compete" case. Sensient's contention is that the defendant knew of the "Sensient Flavors" mark and intentionally selected a very similar mark—first, SensoryFlavors and then SensientEffects Flavor Company—in order to benefit from confu-

> sion that would arise from the similarity of names. Particularly given the initial effort by a former Sensient executive to use the name SensoryFlavors, a jury reasonably could infer that the defendant's choice of the fallback name was still motivated in part by an intent to confuse consumers. *See Beer Nuts, Inc. v. Clover Club Foods Co.*, 805 F.2d 920, 927 (10th Cir. 1986) ("[D]eliberate adoption of a similar mark may lead to an inference of intent to pass off goods as those of another," and "[t]he inference of intent is especially strong when the parties have had a prior relationship."). The permissible inferences about the defendant's intent weigh strongly against summary judgment.

It is telling that Respondents' opposition never addresses the dissent and makes no effort to explain why the dissent was wrong. Respondents' lengthy footnotes arguing about the weight to give certain evidence reflects how they obviously dispute whether Nicolais intended to confuse customers, but the weighing of evidence and the credibility of witnesses' and what they claim to have known or not known are issues for the finder of fact to decide at a trial, not for a court to decide on summary judgment.

Companies like Sensient regularly face the issue of unfair competition by others who deliberately select confusingly similar marks to create initial confusion in order to get their foot in the door with potential customers. Per the dissent, a reasonable fact finder could conclude that this is exactly what occurred here, and thus this case squarely presents the issue of whether evidence that a party deliberately selected a mark to confuse customers gives rise to a presumption of a likelihood of confusion under the

Lanham Act. Accordingly, this Court should grant review to resolve the circuit split and affirm the common sense notion that evidence showing an actor intended to confuse consumers gives rise to a presumption of a likelihood of confusion, for "[i]t would be inconsistent not to require one who tries to deceive customers to prove that they have not been deceived." *Osem Food Indus., Ltd v. Sherwood Foods, Inc.*, 917 F.2d 161, 165 (4th Cir. 1990).

CONCLUSION

For the foregoing reasons and those stated in the Petition, certiorari should be granted.

Respectfully submitted,

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